determine the intention of the Legislature. But it seems to me that the petitioners have only themselves to blame for the heavy nature of their claim or damages. Their remedy was available to them the first day upon which one of these junks entered the waters of the Colony without complying with the requirements of section 14. If the Government had then refused sanction to prosecute the petitioners could have obtained their mandamus at once and upon conviction and fine they could have applied under section 461 to have the fine applied in compensating them for any damages which they had sustained. If they had done that their remedy would have been ample to meet the case. Furthermore the junks would have been liable to a further fine of $500/- every time any one of them repeated the offence. Instead of doing that the petitioners waited for nearly five years before taking action. I appreciate that upon this Motion this Court is not called upon or entitled to assess damages or to consider any question of remoteness of damage. I merely draw attention to this feature of the case in order to support the opinion of which I have formed that there is nothing inherently inadequate in the remedy provided by the Ordinance.

It was objected that the procedure adopted by the Attorney General in applying by Motion under section 22 (2) of the Crown Suits Ordinance was wrong and that recourse should only be had to that sub-section in very clear cases. That and the following sub-section read as follows:—

> "(2) The Attorney-General may not demur but if it appears to him that the petition discloses no case, admitting as true the facts alleged in it which would entitle the petitioners to any judgment decree or order against the Crown he may apply by Motion to the Court, on giving twenty-four hours' notice in the form in Schedule W. for a rule to be served on the Petitioner to show cause why the Petition should not be dismissed.
>
> "(3) If the rule is granted and it appears to the Court upon the hearing that no judgment decree or order can be given on the petition as it stands the Court may direct the petition be dismissed or to be amended on such terms as to costs or otherwise as to the Court seem right."

I entertain no doubt that this is a proper case for such an application. The Attorney General for the purposes of the Motion was prepared to admit the truth of the facts alleged and it appeared to him that they disclosed no case which would entitle the petitioners to judgment. That being so, he was entitled to apply under the sub-section and if the view which I have taken as to the law is correct the result will have been the saving of expense which is no doubt the object of the sub-section.

I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the Appellants—*Adams and Allan.*

(Appellate Criminal Jurisdiction)

Murison, C.J., Burton & Whitley, JJ.

April 19, 1933.

REX v. SANTOKH SINGH

(Singapore Special Case No. 1 of 1933)

Criminal Procedure Code, S. 123—Admission of Confession of accused—Admission of dying declaration of deceased—Reservation by trial Judge at Assizes of points of law for Full Court.

The accused when taken before a magistrate was asked "Do you want to make a statement yourself?" He answered "No, I will answer any questions". Thereafter the magistrate took a statement from him.

Held, that the character of the statement as a voluntary statement was not lost because it was made in the process of question and answer.

Held also, that in taking a confession questions may be asked by the Confessor so long as there is no pressure threat or inducement.

Held further, that questions asked by way of cross-examination are inadmissible.

On the first two points *Rex* v. *Lim Ah Seng* 1931 S.S.L.R. 178 not followed. On the third point *Rex* v. *Lim Ah Seng* followed.

The ruling in *Rex* v. *Lim Ah Seng* that "a statement or confession is not made voluntarily unless it is volunteered" disapproved of, following *Barindra Kumar Ghose* v. *Emperor,* 1909—37 Calcutta at p. 514 and *The King* v. *Best,* (1909) 1 K.B. 692.

SPECIAL CASE stated by Mills, J. under S. 312 of the Criminal Procedure Code.

The facts are set out in the Judgment of Murison, C. J.

P. A. McElwaine, K.C. (D.P.P.) for the Crown.

Coltart for the Accused.

Cur. Adv. Vult.

Murison, C.J.—The accused in this case, one Santokh Singh *alias* Makhan Singh, was convicted of the murder of one Jaimal Singh at Ek Ho Rubber Factory, Paya Lebar, on the 15th December, 1932.

Part of the evidence against the accused consisted of a statement made by the accused to Mr. A. W. Hay, a Police Magistrate. In this statement the accused clearly admitted that he killed Jaimal Singh. This is Exhibit G in the Record. It was made under Section 123 of The Criminal Procedure Code.

Part of the evidence against the accused consisted also of a statement made by Jaimal Singh to Mr. J. Gregg, a Police Magistrate, in regard to the circumstances of the transaction which resulted in his death. In this statement Jaimal Singh indicated that the accused had stabbed him. This is Exhibit F in the Record.

Objections during the trial were taken to the admission of both these statements. The trial judge overruled the objections and admitted the evidence.

He reserved, however, the question of the admissibility of the evidence on both points for the consideration of this Court.

At the trial the accused was found guilty of murder and the trial judge sentenced him to death.

After hearing counsel upon the reserved points this Court ruled that both statements were properly admitted, and the Court intimated that they would later set forth the reasons for this decision.

I now, therefore, give my reasons for my part in the decision.

I deal with the first point first (Exhibit G).

The material parts of this statement are at the beginning and the end. That at the beginning is as follows:

"Q. What is your name?
A. Santokh Singh.
Q. What have you come here for?
A. I was brought by the Police.
Q. Do you want to make a statement yourself?
A. No. I will answer any questions.
I say: (that is, the magistrate says): I'm not going to ask you any questions
He says: It was my brother whom I stabbed.

The material part at the end is as follows:—

"I tell Santokh Singh. **You are not bound** to make this statement. If you like, I will tear up. But if you wish to make it, it can be used against you."

"He says. I have made this statement of my own accord and not on account of anyone telling me or inducing me to do so.
Q. When did you decide that you wanted to make this statement?
A. When I came before you, and you asked me whether I wanted to make a statement."

The remaining part of the statement contains a detailed account how the accused stabbed Jaimal Singh who afterwards died. It is, therefore, a confession.

The first argument against the admissibility of Exhibit G is based upon the last question and answer of those first above quoted:—

"Q. Do you want to make a statement yourself?
A. No. I will answer any questions."

The argument is that as the accused had stated that he did not want to make a statement he should have been told to go away; for, it is said, the statement was not voluntary.

I suggested at the hearing and repeat here that in my opinion the accused did not say "no" in answer to the question if he would make a statement. He said "no" in answer to the suggestion that he should make it *himself*. That is why he added "I will answer any questions." He elected, in other words, to make his statement by the process of question and answer, not by the process of narrative.

If this view is correct the character of the statement as a voluntary statement is not lost because it was made by the process of question and answer.

Thus section 29 of Ordinance 53 (Evidence) says:—

> If such a confession (that is one made by an accused person) is otherwise relevant, it does not become irrelevant merely because———it was made in answer to questions which he (the accused) need not have answered, whatever may have been the form of those questions."

Jenkins, C.J. emphasises the legitimacy of this method of eliciting a statement from an accused in *Barindra Kumar Ghose* v. *Emperor*, (1909) 37 Calcutta, at pages 498-9 and at page 514 of the same case Carnduff, J. says:—

> "And I cannot accept the proposition, urged by Mr. Das, that in no circumstances is a Magistrate justified in eliciting anything from a prisoner by independent enquiry. The examination provided for by Section 342 of the Procedure Code (= section 404 of our Code) is, no doubt, expressly and advisedly now confined to the object of enabling the accused to explain any circumstances appearing in the evidence against him; 'but there is no such limitation placed by section 164 (= our sec. 123) or by any other provision of law of which I am aware, and in the stage of investigation before any evidence has been recorded there is obviously no room for the limitation. At that stage, and, indeed, at any point other than that indicated in section 342, the only thing that is abhorrent is pressure or inducement, and the sole criterion by which the fitness of an examination can, so far as I can see be judged, is with reference to the question whether it was voluntary or not. Therefore, holding as I do that Ullaskar Dutt, for example, was a ready and willing informant, I consider that the questions put to him were all proper questions, and that when he was asked 'Have you anything to say?' and replied 'If you question me I can say', Mr. Birley not only was right in putting further questions to him in response to the invitation, but might reasonably have been found fault with had he refrained from doing so."

Similarly in *The King* v. *Best*, (1909) 1 K.B. 692 it was held that the fact that a prisoner's statement is made by him in reply to questions does not of itself render the statement inadmissible in evidence.

The real point, as Carnduff, J. said, is that the only thing abhorrent is pressure or inducement.

Cross-examination is a form of pressure and is equally abhorrent. But in questions *per se* without any element of this kind, there is nothing that makes a statement cease to be voluntary. But then counsel,

arguing against the admission of the evidence, quoted the recent case, in our own Appeal Court, of *Rex* v. *Lim Ah Seng*, (1931) S.S.L.R. 178. In that case the magistrate asked the accused:

"Do you want to confess?" and the accused replied:

"I am in your hands. Anything you ask I am prepared to answer. Otherwise I say nothing."

The Magistrate then told the accused that he need not answer anything he did not want to answer, and proceeded to put to him a series of questions, some of which seem to me to come perilously near to cross-examination.

The Court first held that a statement or confession made under Section 123 of The Criminal Procedure Code is not made voluntary unless it is volunteered. With great respect I must say that I am not in agreement with that decision. It is contrary to the cases which I have cited and to the express provision of section 29 of the Evidence Ordinance.

The Court next held that the only questions which the accused could be asked were those which tended to assist the prisoner by making his meaning clearer or to ensure that the magistrate correctly understands the prisoner's meaning. Again with respect I do not think that this is a correct statement of the law. It reproduces the limitation laid down in Section 404 of the Criminal Procedure Code (section 342 of the Indian Procedure Code) but there is, as Carnduff, J. pointed out in the case quoted above, no such limitation in section 123 (section 164 of the Indian Code). The law as laid down by the Appeal Court in *Rex* v. *Lim Ah Seng* is, in my opinion, too narrow. The correct view of the law, as I understand it, is that questions may be asked so long as there is no threat or inducement.

The third proposition laid down by the Appeal Court in *Rex* v. *Lim Ah Seng* was that as (according to the opinion of the Court) questions had been asked by way of cross-examination they were improper and the statement was inadmissible. I am in accord with this ruling because cross-examination is a form of threat or inducement.

I feel it is my duty to say that for the reason I have given *Rex* v. *Lim Ah Seng* ought not to be relied upon as a correct statement of the law in regard to the admissibility of statements or confessions made by accused persons.

I, therefore, held that in regard to the first point reserved (Exhibit G) the statement was admissible.

The second point reserved is shorter. It is exhibit F in the Record and consists of a statement by the deceased "Makhal Singh stabbed me" and a note made by the Magistrate that the deponent made very weak gestures, as of stabbing with his hands.

I felt no difficulty whatever in this case.

It is clearly admissible under section 32 of Ordinance No. 53 (Evidence).

For these reasons I held, as stated in the order of the Court, that both statements were rightly admitted in evidence by the learned trial judge.

Burton, J.—I agree that both the confession and the statement of Jaimal Singh were rightly admitted.

The record of the confession shows that when the prisoner was brought before the Magistrate, the Magistrate asked him,

"Do you want to make a statement yourself?" and he replied

"No. I will answer any questions."

The Magistrate said,

"I am not going to ask you questions."

Then the prisoner stated,

"It was my brother whom I stabbed"

and then, when the Magistrate said "Do you want to say anything more?" launched out into his story.

At the end of his statement the Magistrate offered to tear up the record of his statement but the prisoner said,

"I have made this statement of my own accord, and not on account of anyone telling me or inducing me to do so."

The Magistrate all through showed the most conscientious carefulness, and there can be no question that this statement was voluntary. I do not think it would have been possible to question the admissibility of this confession so but for the case of *R.* v. *Lim Ah Seng*, (1931) S.S.L.R. 178 part of the headnote of which states,

"A statement or confession is not made voluntary unless it is volunteered."

The facts of that case appear to be exceptional, but I think that if the case is to be read to decide that a confession must be volunteered to be voluntary, it goes too far. I do not think the words used in relation to the exceptional facts of this case should be pressed into a general application. Sproule, J. characterises the questions put by the Magistrate as "unfriendly and improper" but I can find little in the questions recorded in the report to justify these epithets, though perhaps the last but two is open to objection; but this was after the material part of the confession had been made.

The Evidence Ordinance prescribes by Section 24 what confessions are irrelevant; and it follows that every other confession is admissible. The provisions of section 29, which condones irregularities, are exceedingly wide, but this section does not appear to have been referred to in *Lim Ah Seng's case*. As the learned Deputy Public Prosecutor pointed out, the sole object of the precautions prescribed by law is to ensure the truth of an admitted confession: There is no call to attribute to the Police of this country the unfair methods which have been alleged against the Indian Police, nor to

strain the law in favour of the accused by a refined interpretation of the Evidence Ordinance. Generally speaking it is, I think, correct to say that a confession is voluntary if it is admissible under the Evidence Ordinance, that is, if it is not shut out by sections 24, 25 or 26. In England the case of *R.* v. *Ellis*, R. & M, 432 decided that an examination of a prisoner charged with felony, taken without threat or promise, by questions put by the Magistrate is, notwithstanding, admissible in evidence. This case has stood unquestioned as an authority in England since 1826. I am of opinion therefore that the case of *Lim Ah Seng* contains propositions of law which should not be followed and that the words of the headnote and judgment must not be pressed into general application.

As to the admissibility of Jaimal Singh's statement I have nothing to add.

Whitley, J.—I agree that both the confession and the statement of Jaimal Singh were rightly admitted.

Counsel for the accused admitted that the Magistrate had recorded the confession with scrupulous care and fairness and only objects to its admission on the strength of certain principles laid down in the judgments in the case of *Rex* v. *Lim Ah Seng*, (1931) S.S.L.R. 178

That was also a point reserved heard by a Full Court. I agree with the learned Chief Justice that that case goes too far in the restrictions which it would impose upon the admissibility of statements or confessions by accused persons.

In that case it was held that:

(i) A Statement or Confession, under the section, is not made voluntary unless it is volunteered

(ii) The only questions which may lawfully be propounded by the magistrate are those which tend merely to assist the prisoner by making his meaning clearer or to ensure that the magistrate correctly understands the prisoner's meaning."

As regards the first of these propositions section 123 (3) of the Criminal Procedure Code prohibits the recording by a Magistrate of any statement or confession unless upon questioning the person making it, he has reason to believe that the confession is being made voluntary and section 24 of the Evidence Ordinance provides that a confession is irrelevant if the making of the confession appears to the Court to have been caused by any inducement threat promise etc.

These two sections re-enact for this Colony a principle which Lord Sumner describes in the case of *Ibrahim* v. *Rex*, (1914) A.C. at page 609 as being as old as Lord Hale. "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

The law as to admissibility is stricter in the Colony than in England in one respect. In England a confession made to a police officer after the prisoner has been duly cautioned is admissible whereas here no confession made by an accused can be proved against him unless made to a Magistrate. Apart from this additional precaution in favour of the accused person the law as to admissibility is the same here as that in England and in no reported case in England have I been able to find authority for the proposition that a confession must be not only voluntary but also volunteered.

As regards the second proposition the provisions of section 29 of the Evidence Ordinance appear to have been overlooked. That section provides that if a confession is otherwise relevant it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever have been the form of those questions, or because he was not warned that he was not bound to make such confession and that evidence of it might be given against him.

This section which is very wide in its terms is based upon a large number of English decisions which establish that confessions should be taken into account unless their cause was such that the accused was likely to have been induced to untruly confess. The law of England has long been tender towards prisoners in this matter. As Baron Parke observed in *R.* v. *Baldry*, (1852) 2 Den. Cr. C. at p. 445, "by the law of England, in order to render a confession admissible in evidence, it must be perfectly voluntary, and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession. The decisions to that effect have gone a long way: whether it would not have been better to allow the whole to go to the jury it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence . . . justice and commonsense have too frequently been sacrificed at the shrine of mercy."

The law is now well settled that in order that a confession should be invalidated, there must be an inducement operating to influence the mind of the accused

either by hope of escape or through fear of punishment connected with the charge. Such inducement must relate to the charge and reasonably imply that the position of the accused with reference to it will be rendered better or worse according as he does or does not confess. If the confession be obtained by any other influence, it will not be invalidated.

The weight of a confesssion may be affected by the circumstances under which it was made as in the case of *R.* v. *Spilsbury*, 7 Car. & P. 187, where it was alleged that a constable had made the accused drunk and that the latter then made a statement. Coleridge, J. observed "A statement made by a prisoner while drunk is not therefore inadmissible as evidence and to render a statement inadmissible it must be obtained by hope or fear. This is a matter of observation for me upon the weight which ought to attach to this statement when it is considered by the jury."

There are a number of English cases which establish that a confession is not invalidated by reason of its having been obtained by means of question and answer but in view of words in section 29 "whatever may have been the form of those questions" there is no need to consider them in detail.

Applying the principles to be extracted from section 29 and the English cases I have no doubt that the confession in the present case was duly made and recorded according to law and is open to no possible objection. I would go further and express the opinion that it is the duty of any Magistrate who is placed in the same position as Mr. Hay was in this case to proceed as he did and when an accused person says he does not wish to make a statement but will answer any questions always provided that he satisfies himself that the answers are made voluntarily in the sense that they are not induced by any promise or threat. Many natives of the coolie class are incapable of making a coherent connected statement without assistance by way of questioning and I can well understand such a man as the accused in the present case being genuinely desirous of making a statement and expressing his desire that it should take the form of question and answer.

The objection to the admissibility of the statement of Jaimal Singh the deceased was based upon the assumption that the fact that a statement which purported to be taken under section 404 of the Criminal Procedure Code was by reason of certain requirements of that section not having been fulfilled inadmissible as evidence under that section precluded it from being admitted as evidence under any other section.

Section 404 reads as follows:—

"(1) Whenever it appears to a Police Magistrate that any person able to give material evidence either for the prosecution or defence touching a seizable offence is so dangerously ill that it is not practicable to take his evidence according to the usual course of law, any Police Magistrate may take the deposition of such person provided such reasonable notice as the case admits of has been given to the prosecutor and the accused of his intention to take it and of the time and place at which he intends to take it.

(3) When it is proved at the trial of the said accused for any offence to which such deposition relates that the deponent is dead or that for any sufficient cause his attendance cannot be procured, the deposition may be read either for or against the accused notwithstanding his absence when the same was taken if it is certified under the hand of the Police Magistrate who took it and the contrary is not proved or if it is shown by extrinsic evidence that

(a) the deponent was at the time of his examination dangerously ill as aforesaid;

(b) the said deposition was duly taken at the place and time notified; and

(c) reasonable notice of the intention to take it was given to the person against whom it is tendered in evidence so that he or his advocate might have been present and might have had, if he had chosen to be present, full opportunity of cross-examination.

The Magistrate recorded the statement of Jaimal Singh at the hospital shortly before he died. He was so weak that all he could say was "Makhan Singh stabbed me." The accused was not present as it was desired to hold an identification parade afterwards and it was rightly considered that the value of any subsequent identification would have been nullified if the deponent had already had the opportunity of seeing the man whom he was to identify. After the statement had been recorded the accused was paraded with a number of others before Jaimal Singh who picked him out as his assailant. The deposition was then read over to accused who said he did not wish to ask any questions.

It was held that as the accused was not present when the deposition was actually recorded it could not be admitted in evidence under section 404. The prosecution then tendered it under section 32 (1) of the Evidence Ordinance which provides that statements made by a person who is dead are relevant when made as to the cause of his death. This statement is clearly admissible under that section for in this Colony it is not necessary as in England that the statement should have been made "in the settled expectation of death." No authority was adduced for the proposition that because it was not admissible under the one section it could not be admissible under the other and I can find no substance in that argument.

It was further argued that it ought not to be admitted because it was made on oath. That argument is I think equally fallacious. The fact that it was made on oath must obviously add to rather than detract from its value. When a person has been seriously wounded a statement should be taken from him at the earliest possible moment lest he die before any formal

deposition can be recorded. As soon as the suspected assailant is arrested, if the victim still lives a deposition should be recorded in the presence of the accused. That deposition is taken on oath under section 404 and as the accused has the opportunity to cross-examine it is more valuable than a statement made not in the presence of the accused. This deposition is evidence under section 32 and if the requirements of section 404 have been complied with it becomes also evidence and stronger evidence under that section.

I would suggest that the difficulty in which the Magistrate found himself with regard to keeping the accused in the back ground until the identification parade was held might be solved in future similar cases by having all the persons who are to be included in the parade present when the wounded man makes his deposition. When he has finished he could be asked if he could identify his assailant and the accused could then be given the opportunity to cross-examine.

Conviction affirmed.

Solicitors for the Accused—*Rodyk & Davidson.*